Asbestos Carting Corp. *and* Private Sanitation Union, Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO. Case 2–RM–2000

March 27, 1991

DECISION ON REVIEW AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On April 20, 1990, the Regional Director for Region 2 issued a Decision and Order Dismissing Petition in the above-entitled proceeding. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review.

On October 18, 1990, the Employer's request for review was granted. No briefs were filed on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board, having carefully reviewed and considered the entire record, has decided to affirm the Regional Director's dismissal of the petition, but on different grounds.

The Employer filed the petition after the Union requested the Employer to recognize the Union as the bargaining representative of the Employer's employees. The Union has collective-bargaining agreements with two other companies, Young Carting Corp. (Young) and Victory Sanitation Ltd. (Victory). The Union alleges that the Employer is a single employer with, or the alter ego of, Young and/or Victory. The Union seeks recognition as the representative of the Employer's employees solely on the basis that these employees are covered under one or both of the existing collective-bargaining agreements between the Union and the two other companies. The Union, having filed grievances with Young and Victory, seeks to resolve this issue exclusively through arbitration under its contracts with the two companies.[1]

A hearing was held concerning the Employer's petition where the Union disclaimed interest in representing the Employer's employees in a separate bargaining unit and moved to dismiss the petition. The Union argued that, as it does not claim to represent these employees in a separate unit, an election in a separate unit is not appropriate. Further, the Union argued that the issue of whether these employees were covered by the Union's collective-bargaining agreements with Young and Victory should be resolved through arbitration. The Employer argues that the Union's demand for recognition creates a question concerning representation, and as the Union's demand is based on allegations of single employer/alter ego status and accretion, the matter is within the particular expertise of the Board and should not be deferred to arbitration.

After the Union moved to dismiss the proceeding and before any evidence was taken regarding the single employer/alter ego and accretion issues, the Union discontinued its participation in the proceeding and the Union's attorney walked out of the hearing. The Union's position was that, in light of the Union's disclaimer of interest and its pursuit of arbitration to resolve the single employer/alter ego issue, there was no basis for proceeding with the hearing.

The hearing proceeded without further participation by the Union. The Employer presented evidence on the Union's demand for recognition, the single employer/alter ego allegation, and accretion.

Citing *Woolwich, Inc.*, 185 NLRB 783 (1970), the Regional Director found that the Union's pursuit of its grievance to arbitration is insufficent to warrant the continued processing of the petition, and on this basis dismissed the petition. The Regional Director additionally noted that although the Board in *Woolwich* dismissed the petition because the union had disclaimed interest in representing the Woolwich employees in a separate unit, the Board proceeded to resolve the question of whether the Woolwich employees constituted an accretion to a unit of employees of Morris, Inc., which in turn was part of a multiemployer bargaining unit covered by a contract with the union. In the instant case, however, the Regional Director concluded that he was unable to resolve the single employer[2] issue from the evidence in the record. In making this determination, the Regional Director noted that the owners of the Employer, Young and Victory, were all friends since childhood, that the Employer's sole owner had been an employee of Young from 1983 until the Employer's commencement of operations in December 1988, that there was conflicting evidence regarding whether the owner of Young was also a part owner of Victory, and that the Employer and Victory may share common attorneys.

The Board granted the Employer's request for review. These single employer/alter ego and accretion issues involve application of statutory policy, standards, and criteria and thus are matters for decision of the Board rather than an arbitrator.[3] We will not, therefore, defer them to an arbitrator as the Union requests. After reviewing the record, we find that there exists sufficient evidence to resolve these issues.[4] Having consid-

[1] The Union additionally had filed a charge alleging that the Employer violated Sec. 8(a)(5) of the Act, but has since withdrawn the charge.

[2] The Regional Director did not address the alter ego allegation.

[3] See, e.g., *Magna Corp.*, 261 NLRB 104, 105 at fn. 2 (1982); *Williams Transportation Co.*, 233 NLRB 837, 838 (1977); *Marion Power Shovel Co.*, 230 NLRB 576 (1977); *A. Dariano & Sons, Inc. v. Painters Council 33*, 869 F.2d 514 (9th Cir. 1989).

[4] Our concurring colleague argues that resolution of these issues is inappropriate here because the Union was not put on notice that these issues would be resolved within the context of this proceeding. We disagree. The Union's

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ered the evidence, we also find the Employer to be an independent entity, and on this basis we affirm the Regional Director's dismissal of the petition.

The Employer is engaged in the removal and transportation of asbestos and other carcinogenic materials. The Employer's employees are not presently, and have not previously been, represented by a labor organization. Young is a company engaged in demolition work. Victory is a company engaged in household and municipal garbage pickup.

The Employer was incorporated in December 1987 and commenced operations in December 1988. The Employer's sole stockholder and officer is Peter Velazquez. As noted by the Regional Director, Velazquez was an employee of Young from 1983 through 1988. Velazquez has never been an employee of Victory. Velazquez possesses no financial interest in either Young or Victory and is not in any way involved in their operations. Michael Vince, a former employee of Victory, is employed by the Employer as a supervisor. The Employer hired Vince approximately 1 year after Vince was discharged by Victory.

Velazquez, the sole witness to testify at the hearing, testified that the owner of Young is Nunzio Squillante and the owner of Victory is Richard Bizenza. The Regional Director notes, however, that a stipulation in an unfair labor practice proceeding, *Hunt's Point Recycling Corp., a joint venture of Mid Bronx Haulage and Victory Sanitation Ltd.*, Case 2–CA–23211, indicates that Bizenza and Squillante are co-owners of Victory. Velazquez, Bizenza, and Squillante have all been friends since childhood. Velazquez and Vince have also been friends since childhood.

Velazquez is solely responsible for establishing wages, benefits, and all other terms and conditions of employment for the Employer's employees. None of the Employer's employees other than Vince have ever worked for Young or Victory. There is no interchange of employees between the Employer and either Young or Victory. The Employer's employees are required to have special training and licensing in order to work with asbestos and other carcinogens.

The Employer operates out of three locations. One of the locations consists of leased space in a building on Tiffany Street in the Bronx. Victory is one of several other companies who lease space in the same building. The Employer does not use any of the space rented by Victory, and Victory does not use any of the space rented by the Employer. There is no evidence that the building's landlord is connected in any other way to the Employer, Victory or Young.

The Employer uses equipment unique to its business. The Employer may not, by law, use the equipment Victory uses in its garbage pickup business for the Employer's type of work–-the removal and transportation of carcinogenic material. Further, when the Employer's employees are performing their work at a jobsite, employees from a company engaged in demolition work such as Young, or in garbage pickup such as Victory, are prohibited by Federal law from being on the same site.

We find that the Employer is not a single employer with, or the alter ego of, either Victory or Young. Single employer status is determined by examining whether the entities have common ownership, common financial control, interrelation of operations, and centralized control of labor relations. *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965). Here, there is no common ownership or financial control, and no common management between the Employer and either Young or Victory. Velazquez, the Employer's sole shareholder and officer, is wholly responsible for exercising financial control over and managing the Employer's operations. Velazquez has no interest in, and has no authority over, the operations of Young or Victory.

Further, there is no interrelation of operations between the Employer and the other two companies. The Employer, Victory, and Young are three separate and distinct companies engaged in three different types of business. The Employer does different work, uses different equipment, and has different employees who are specially trained to do the Employer's work.

Finally, there is no centralized control of labor relations. Velazquez alone controls the Employer's labor relations, and is responsible for setting terms and conditions of employment. Velazquez is not involved with the labor relations of Young or Victory.

In determining whether there is an alter ego relationship between two or more companies, the Board examines the following factors: whether there exists substantially identical ownership, management, supervision, operation, equipment, or customers, and whether there exists an unlawful motive to evade responsibilities under the Act. *Advance Electric*, 268 NLRB 1001 (1984); *Image Convention Services*, 288 NLRB 1036 (1988). We find none of these indicia here. Rather, we find that the Employer is an entity entirely independent of Young or Victory.[5]

sole basis for demanding recognition was that the Employer had a single employer or alter ego relationship with Young and/or Victory. As this issue is a matter for decision by the Board rather than an arbitrator, and as this issue provides the only basis for the dispute between the Employer and the Union, the Union knew or should have known that the Board would consider the single employer/alter ego issue rather than defer it to arbitration. Further, the Union was free to continue its participation in the hearing and to argue that it did so without prejudice to its principal position that the petition should be dismissed on the basis that the Union has disclaimed interest in representing the employees in a separate unit. Finally, we note that the Union itself did not argue that it was not given proper notice that the Board would resolve the single employer/alter ego issue, but rather argued that the Board should defer resolution of this issue to arbitration.

[5] The Regional Director found that a question exists regarding whether the Employer and Victory share the same counsel. The Employer was represented at the hearing by Horowitz and Pollack Associates. The Regional Director

As the Employer is not a single employer with, or the alter ego of, either Victory or Young, there can be no accretion to a bargaining unit with employees of either Young or Victory. In view of the foregoing, and in view of the fact that the Union does not seek to represent the Employer's employees in a separate bargaining unit, we find that there is no question concerning representation and accordingly dismiss the petition.

ORDER

The petition is dismissed.

MEMBER CRACRAFT, concurring.

I agree with my colleagues' dismissal of the instant petition. Contrary to my colleagues, however, I would dismiss the petition solely for the reason relied on by the Regional Director, that as the Union does not seek to represent the Employer's employees in a separate unit, no question concerning representation exists. I do not believe it is necessary or appropriate to address the single employer/alter ego issue in this proceeding.

In addressing this issue in this proceeding, my colleagues have, in effect, treated the Employer's RM petition[1] as if it were a unit clarification (UC) petition. The Board may, in its discretion, resolve unit clarification issues in an RM proceeding. See *Woolwich, Inc.*, 185 NLRB 783 (1970); *Amperex Electronic Corp.*, 109 NLRB 353 (1954). As noted by my colleagues, issues of single employer, alter ego, and accretion are matters for decision of the Board rather than for an arbitrator. I agree that in certain RM proceedings, when the participating parties have developed a record concerning single employer/alter ego and accretion issues that are at the heart of a dispute, it may be appropriate for the Board to consider these issues in processing the petition. Resolution of these issues, though, is not required in processing an RM petition, and no party is under a procedural obligation to litigate unit clarification issues within the context of an RM proceeding.

When the Board initially considered the Employer's request for review in this proceeding, the Board agreed with the Regional Director's reason for dismissing the petition, but decided to grant review in order to see if there already existed a fully developed record concerning the single employer/alter ego and accretion issues. If such a record existed, with evidence submitted from all the participating parties, it would be permissible and likely most efficient to proceed with resolving these issues rather than to wait for a UC petition to be filed and hold another hearing.

Having reviewed the record, the Board has learned that the Union did not participate in this proceeding to the extent of developing a record with respect to the single employer/alter ego issues. Consequently, the record concerning these issues consists only of evidence submitted by the Employer. I find that in this situation, such a record does not provide a basis on which to resolve the single employer/alter ego issue at hand.

As noted by my colleagues, the Union was not prevented from litigating this issue, but had voluntarily chosen not to participate in this aspect of the proceeding. I find, though, that because the hearing concerned the Employer's RM petition, and not a UC petition, the Union was not procedurally obligated to litigate the issues of single employer/alter ego and accretion.

The Union fully participated in the proceeding to the extent that it argued that the Union's disclaimer of interest in representing the employees in a separate unit precludes a finding of a question concerning representation, and that therefore dismissal was warranted without having to resolve the single employer/alter ego issue. The Union's position was in accordance with Board law, and in fact was the basis for the Regional Director's dismissal of the petition. The Union was not put on notice that even if the Union's argument was correct, the Board would nevertheless proceed and make a finding concerning the single employer/alter ego issue. Furthermore, as this was not a UC proceeding, the Union had no reason to believe that the Board would proceed on this basis and clarify the unit with or without the Union's participation in the evidentiary part of the hearing.

My colleagues correctly argue that the Board rather than an arbitrator should resolve the single employer/alter ego issue. This does not, however, mandate resolution of the issue within the context of this proceeding. Rather, the issue should be resolved when a UC petition has been filed. A UC hearing would put all interested parties, including Young and Victory, on notice that the Board will be considering the single employer/alter ego issue even if they choose not to participate in the proceeding.

As the Union has disclaimed interest in representing the Employer's employees in a separate unit, and as the record concerning the single employer/alter ego issue was developed without the Union's participation in that portion of the hearing, I would dismiss the petition without resolving the single employer/alter ego issue.

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noted that Horowitz and Pollack, P.C. represented Victory in the Hunt's Point proceeding mentioned above and that Horowitz and Pollack, P.C. represented the Employer in the unfair labor practice charge filed by the Union that was later withdrawn. The Regional Director further notes that Horowitz and Pollack Associates and Horowitz and Pollack, P.C. share the same address and phone number. We reach our conclusion that the Employer is independent of Young and Victory regardless of whether there is some relationship between counsel representing these entities.

[1] An RM petition is a petition for election filed by an employer, pursuant to Sec. 9(c)(1)(B) of the Act, in response to a union's claim for recognition as the bargaining representative of the employer's employees.